# AUSTRALIAN UNFAIR CONTRACT TERMS LAWS AND INTERNATIONAL BUSINESS: HIGH COURT FINDS GLOBAL CONTRACT SUBJECT TO AUSTRALIAN LAWS AND CLASS ACTION WAIVER CLAUSE TO BE UNFAIR

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**Australia Antitrust, Competition, and Trade Regulation Alert**

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## IN BRIEF

The High Court of Australia (the Court) has provided important guidance on the application of Australia's unfair contract terms (UCT) regime to global standard form contracts, the validity of class action waiver clauses, and the enforceability of exclusive jurisdiction clauses.

This guidance is of particular importance to global companies carrying on business in Australia based on standardised global contracts (which may have governing law or exclusive jurisdiction clauses or both outside of Australia) or any business incorporating a class action waiver clause in its standard form contracts.

Our key takeaways for businesses from this case are as follows:

- Australia's UCT regime has broad extraterritorial reach and will apply to standard form contracts entered into by foreign companies carrying on business in Australia, even where the contract's governing law is specified to be outside of Australia.
- Class action waiver clauses (typically involving a party agreeing that claims can only be made on an individual basis, rather than as part of a class or group) are at a high risk of being an unfair contract term, which can now result in significant penalties pursuant to recent changes to the Australian Consumer Law (ACL).
- When considering the transparency of clauses from an UCT perspective, businesses should make higher risk clauses more transparent and carefully consider the 'click through' flow of webpages and documents when presenting high-risk clauses in contract signing processes.
- Exclusive jurisdiction clauses (specifying a jurisdiction outside of Australia) may not be enforced by Australian courts.

This Legal Insight provides more detailed insights into the above key takeaways.

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## CASE BACKGROUND

This case considers the US Terms and Conditions of Carnival plc (the Cruise Line Company), a supplier of cruise ship services, entered into by a consumer (Mr Ho, a Canadian resident). The appellant (Ms Karpik) commenced class action proceedings against the Cruise Line Company, as the operator of the passenger ship *Ruby Princess*, in relation to an outbreak of COVID-19 on the ship in Sydney in 2020.

The Cruise Line Company sought a stay of these proceedings in relation to Mr Ho, and a large number of other passengers who entered into the US Terms and Conditions, which contain an exclusive jurisdiction clause (in favour of the Courts of California) and a class action waiver clause.

## REFRESHER ON THE UCT REGIME

Australia's UCT regime applies to 'standard form contracts', where at least one party is a 'consumer' or a 'small business.' In November 2023, the definition of 'small business' was significantly expanded to mean businesses with less than 100 employees or annual turnover of less than AU$10 million. Read more about the UCT regime and recent reforms here.

The consequences of entering into a contract containing an unfair contract term, or relying or purporting to rely on an unfair contract term are significant and include the following:

- Significant financial penalties in the event of court proceedings by regulators (primarily the Australian Competition and Consumer Commission or Australian Securities and Investments Commission) - maximum penalties on a per breach basis under the ACL are: (1) for companies: the greater of AU$50 million, 30% of adjusted turnover, or three times the benefit gained from the breach; or (2) for individuals - AU$2.5 million.
- The unfair contract term is declared void, which may have flow-on consequences of a party's ability to exercise rights specified in a contract, as well as damages.

## TAKEAWAY ONE: THE UCT REGIME HAS EXTRATERRITORIAL APPLICATION

In considering whether the class action waiver clause was unfair, the Court first assessed the important question of whether Australia's UCT regime applied to the Cruise Line Company's US Terms and Conditions. This contract was made outside of Australia, entered into between a Canadian resident and the Cruise Line Company as a foreign entity carrying on business in Australia, and subject to a governing law clause specifying maritime law of the United States.

In its unanimous decision, the Court confirmed that Australia's UCT regime applied to the US Terms and Conditions and that the proper interpretation of the ACL is for section 23 of the ACL (the UCT provision) to operate with section 5 of the *Competition and Consumer Act* (which states that the Act extends to conduct engaged in outside of Australia by companies incorporated in, or carrying on business within, Australia).

The Court stated that *"...a corporation that does business in Australia should be required, if it uses standard terms in a consumer or small business contract, to meet Australian norms of fairness irrespective of whether the standard terms are in a contract made in Australia or one made overseas."*

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In reaching this view, the Court also confirmed a number of important principles about the application of the UCT regime (and the ACL), including:

- A foreign governing law clause (specifying laws other than Australian law) will not avoid the application of the UCT regime;
- The contract does not need to have been entered into *while* the foreign company was engaged in business in Australia (in other words, this temporal limitation does not apply);
- The UCT regime is not limited to contracts affecting the acquisition of goods or services *in* Australia; and
- The UCT regime is not limited to conduct engaged in *predominantly* in Australia, as this is not a relevant criteria.

## TAKEAWAY TWO: CLASS ACTION WAIVER CLAUSES ARE A HIGH RISK OF BEING UNFAIR

After ruling that the UCT regime applies to the US Terms and Conditions, the Court ruled that the class action waiver clause was an unfair contract term, overruling the finding by the Full Federal Court.

In reaching this decision, the Court considered that the class action waiver clause (the *italicised* phrases below being the relevant elements for assessing an unfair contract term under the ACL):

- Would cause a *significant imbalance in the parties' rights* under the contract—the clause is 'one way' in that it only restricts the options of passengers and not of the Cruise Line Company, the contract as a whole already has an imbalance in rights which were not to the benefit of passengers and despite not impeding the passenger's individual right to sue, the operation of the clause would prevent or discourage passengers from vindicating their legal rights where the individual cost may be uneconomical.
- Was *not reasonably necessary to protect the legitimate interests* of the Cruise Line Company—the Court did not accept the contention that a class action defendant may be pressured into settling questionable claims and held that there is no legitimate interest in the Cruise Line Company seeking to prevent people from participating in a class action.
- Would *cause detriment* if relied on—the Court confirmed that detriment need not be limited to financial detriment, and in the particular circumstances of this case, the Cruise Line Company's reliance on the class action waiver clause would result in the passenger being denied the benefits of participating in a class action.
- Was *not transparent*—while the clause was plainly legible, the passenger was unable to view the clause until after receiving the booking confirmation email and after navigating the resulting webpage containing three different contracts and signing into the cruise personaliser webpage.

Importantly, the Court also noted that *"the greater the imbalance or detriment inherent in the term, the greater the need for the term to be expressed and presented clearly; and conversely, where a term has been readily available to an affected party, and is clearly presented and plainly expressed, the imbalance and detriment it creates may need to be of a greater magnitude."*

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## TAKEAWAY THREE: EXCLUSIVE JURISDICTION CLAUSES MAY NOT BE ENFORCED BY AUSTRALIAN COURTS

The exclusive jurisdiction clause specifying the Courts of California was not challenged as an unfair contract term. Rather, the Court considered whether to enforce the exclusive jurisdiction clause and exercise its discretion to stay the proceedings on this basis.

The Court determined that there were strong reasons not to enforce the exclusive jurisdiction clause, including that enforcing the clause may deny passengers access to justice (the class action waiver clause may be enforceable in the United States) and would fracture litigation if the passengers are forced to commence identical claims in the United States.

Please get in contact with us if you would like more detail about the above issues.

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